DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO

Civil Action No. 92 CV 7223, Courtroom 19

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

RICHARD G. EVANS, ANGELA ROMERO, LINDA FOWLER, PAUL BROWN, JANE DOE, MARINA NAVRATILOVA, BRET TANBERG, PRISCILLA INKPEN, JOHN MILLER, THE BOULDER VALLEY SCHOOL DISTRICT RE-2, THE CITY AND COUNTY OF DENVER, THE CITY OF BOULDER, THE CITY OF ASPEN, and THE CITY COUNCIL OF ASPEN,

Plaintiffs,

v.

ROY ROMER as Governor of the State of Colorado, GALE NORTON as Attorney General of the State of Colorado, and THE STATE OF COLORADO,

Defendants.

INTRODUCTION

On November 3, 1993, by a vote of 53.4% to 46.6%, the voters of the State of Colorado passed an initiated amendment to the Colorado Constitution referred to as Amendment 2. That amendment provides:

> No Protected Status Based on Homosexual, Lesbian, or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.

Nine days after the amendment was passed, plaintiffs, individuals, three home rule cities, and a school district, filed the instant action seeking to have Amendment 2 declared unconstitutional. Plaintiffs also sought and obtained a preliminary injunction prohibiting the amendment from becoming effective prior to court review. That injunction was upheld by the Colorado Supreme Court July 19, 1993 in Evans v. Romer, 854 P.2d 1270 (Colo. 1993).

In its ruling, the Colorado Supreme Court did more than merely affirm the granting of the preliminary injunction. By the terms of its ruling that court set the guidelines this court must apply in making its present decision. Certain parts of the Supreme Court opinion must be noted for they form the basis for the present ruling. The Colorado Supreme Court held:

> We conclude that the Equal Protection Clause of the United States Constitution protects the fundamental right to participate equally in the political process, and that any legislation or state constitutional amendment which infringes on this right by "fencing out" an independently identifiable class of persons must be subject to strict judicial scrutiny. (Footnote omitted)

Evans, 854 P.2d at 1282.

Further, the Supreme Court ruled:

Amendment 2 expressly fences out an independently identifiable group. Like the laws that were invalidated in *Hunter*, which singled out the class of persons "who would benefit from laws barring racial, religious, or ancestral discriminations," *Hunter*, 393 U.S. at 391, 89 S.Ct. at 560, Amendment 2 singles out that class of persons (namely gay men, lesbians, and bisexuals) who would benefit from laws barring discrimination on the basis of sexual orientation. No other identifiable group faces such a burden -- no other group's ability to participate in the political process is restricted and encumbered in a like manner. Such a structuring of the political process undoubtedly is contrary to the notion that "[t]he concept of 'we the people' under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications." *Gray v. Sanders*, 372 U.S. 368, 379-80, 83 S.Ct. 801,808, 9L.Ed.2d 821 (1963).

In short, gay men, lesbians, and bisexuals are left out of the political process through the denial of having an "effective voice in the governmental affairs which substantially affect their lives." *Kramer*, 395 U.S. at 627, 89 S.Ct. at 1889. Strict scrutiny is thus required because the normal political processes no longer operate to protect these persons. Rather, they, and they alone, must amend the state constitution in order to seek legislation which is beneficial to them. By constitutionalizing the prescription that no branch or department, nor any agency or political subdivision of the state "shall enact, adopt, or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation . . . shall constitute or otherwise be the basis of . . . [a] claim of discrimination," Amendment 2 singles out and prohibits this class of persons from seeking governmental action favorable to it and thus, from participating equally in the political process. (Footnote omitted)

Id. at 1285.

By stating that "strict scrutiny is required," the Supreme Court established the burden of proof at the trial.

Laws that are subject to strict scrutiny review will be sustained only if they are supported by a compelling state interest and narrowly drawn to achieve that purpose in the least restrictive manner possible. *Plyler v. Doe*, 457 U.S. 202, 217 102 S. Ct. 2382, 2395, 72 L.Ed. 2d 786 (1982).

Id. at 1275.

FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING OFFERED COMPELLING STATE INTERESTS

By virtue of the Supreme Court ruling, the burden at trial was upon defendants to show at least one compelling state interest and to show that Amendment 2 was narrowly drawn to support that interest. This is an unusual placement of the burden of proof. Defendants presented six alleged "compelling state interests": 1) deterring factionalism; 2) preserving the integrity of the state's political functions; 3) preserving the ability of the State to remedy discrimination against suspect classes; 4) preventing the government from interfering with personal, familial and religious privacy; 5) preventing government from subsidizing the political objectives of a special interest group; and 6) promoting the physical and psychological well-being of our children. (Defendants' Trial Brief pp 3-4). The court will address each claimed compelling interest separately.

The first claimed compelling state interest is that Amendment 2 deters factionalism. In their trial brief Defendants describe what they mean by factionalism as follows:

> Amendment 2 does not purport to serve any interests outside of Colorado's borders; rather, it simply seeks to ensure that the deeply divisive issue of homosexuality does not serve to fragment Colorado's body politic. Amendment 2 eliminates city-by-city and county-by-county battles over the political issue of homosexuality and bisexuality. As a matter of law, therefore, Amendment 2 serves a compelling state interest by ending political fragmentation and promoting statewide uniformity on this issue.

(Defendants' Trial Brief, pp 60-61.)

As defined by defendants, "factionalism" means "political fragmentation" over a controversial political issue. Defendants therefore define a difference of opinion on a controversial political question as factionalism.

In support of this position defendants urge two cases, Storer v. Brown, 415 U.S. 724, 94 S.Ct. 1274, 39 L.Ed.2d 714, (1974), and Anderson v. Celebreeze, 460 U.S. 780, 103 S.Ct. 1564, 75 L.Ed. 2d 547(1983). The word "factionalism" appears in both of those cases. The word "factionalism" is not used in either Storer or Anderson in the same way as defendants here seek to use it. Additionally, neither case is even critical of

"factionalism" as it is used in those cases. Finally, deterring factionalism was not the compelling state interest urged in those two cases.

Both Storer and Anderson address state rules and regulations for placing the name of independent, meaning not Republican or Democratic, candidates on election ballots. The states in each case sought to justify their regulations by urging the compelling state interest of "political stability." The ruling in each case addresses the stability of political processes for established parties and independents to place candidates names on election ballots.

In both cases it is only "splintered parties and unrestrained factionalism" (emphasis supplied) which is criticized by the Supreme Court. Defendants here do not seek to deter "unrestrained" factionalism. The "factionalism" which defendants here argue about found to be a great strength of the American political process in the cases cited. In Anderson the Supreme Court endorses that which defendants here seek to deter:

> By limiting the opportunities of independent-minded voters to associate in the electoral arena to enhance their political effectiveness as a group, such restrictions threaten to reduce diversity and competition in the marketplace of ideas. . . . In short, the primary values protected by the First Amendment -- "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open" (citation omitted) -- are served when election campaigns are not monopolized by the existing political parties.

Anderson, 460 U.S. at 794, 75 L.Ed.2d at 561.

The Anderson court made reference to its earlier decision in Williams v. Rhodes, 393 U.S. 23, 21 L.Ed.2d 24, 89 S.Ct. 5, (1968), another case dealing with state limitations on parties other than Republicans or Democrats in placing candidates names on election ballots, by repeating: "Competition in ideas and governmental policies is at the core of our electoral process and of the First Amendment freedoms." Anderson, 460 U.S. at 802, 75 L.Ed.2d at 566.

Defendants' own authorities encourage the "competition of ideas" with "uninhibited, robust and wide-open" political debate. Defendants seek to deter those very things as being "factionalism". The history and policy of this country has been to encourage that which defendants seek to deter.

Defendants first claimed compelling state interest is not a compelling state interest. The opposite of defendants' first

claimed compelling interest is most probably compelling.

Defendants' second suggested compelling state interest is the preservation of the State's political functions. Witnesses were offered who testified about the "homosexual agenda" and the homosexual push for "protected status" and urged that this Amendment protected Colorado's political functions from being overrun by such groups. These witnesses included Will Perkins, Tony Marco, and Kevin Tebedo.

Mr. Perkins identified himself as a Chrysler dealer in Colorado Springs and Chairman of the Board of Colorado for Family Values (hereafter CFV), the organization that spearheaded the campaign for Amendment 2. He indicated that CFV intended Amendment 2 to deny protected status to homosexuals and bisexuals. Mr. Marco identified himself as a free lance writer of mixed political heritage. He testified that at one time he was a Marxist-Leninist, that he had attended a number of colleges, ultimately earning a masters degree in creative writing, that in a sense he was the founder of CFV, and that Amendment 2 was his idea. He testified that Amendment 2 was a defensive measure to fend off state-wide militant gay aggression. The court's notes contain his term "militant gay aggression" no less than six times in his direct testimony alone. Mr. Tebedo identified himself as the paid executive director of CFV and one of its founders. He testified that the purpose of Amendment 2 was to prevent the government from declaring that homosexuals are entitled to protected class status. He made clear his belief that absent Amendment 2, affirmative action programs for homosexuals would somehow be implemented in Colorado.

Defendants' argument as to this claimed interest was based on the Tenth Amendment to the U.S. Constitution which grants the power to amend state constitutions to the states. Defendants argue that the people through their votes have decided to amend the Colorado constitution and that vote should end the discussion.

Both this court in its ruling granting the preliminary injunction and the Supreme Court in affirming that injunction made specific reference to the constitutional provisions granting the right and power of the people of Colorado to amend their Constitution. The very first footnote in the Supreme Court opinion reads:

> [1]Art. II, §1, of the Colorado Constitution proclaims that "[a]ll political power is vested in and derived from the people; all government of right, originates from the people, is founded upon their will only, and is instituted solely for the good of the whole." Art. II, §2, provides that "[t]he people of this state have the sole and exclusive right of

> governing themselves, as a free, sovereign and independent state; and to alter and abolish their constitution and form of government whenever they may deem it necessary to their safety and happiness, provided, such change be not repugnant to the constitution of the United States." (Emphasis supplied)

Evans, 854 P.2d at 1272.

Also, the very last section of the majority opinion the Supreme Court once again acknowledged the significance of the election, but put that election in perspective:

> That Amendment 2 was passed by a majority of voters through the initiative process as an expression of popular will mandates great deference. However, the facts remain that "[o]ne's right to life, liberty, and property . . . and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections," *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638, 63 S.Ct. 1178, 1185, 87 L.Ed. 1628 (1943), and that "[a] citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that it be." *Lucas v. Forty-Fourth Gen. Assembly of Colo.*, 377 U.S. 713, 736, 84 S.Ct. 1459, 1474, 12 L.Ed.2d 632 (1964).

Evans, at 1286.

The evidence presented does not satisfy this court that there is militant gay aggression in this state which endangers the state's political functions. Similarly the evidence does not persuade the court that absent Amendment 2, homosexuals and bisexuals are going to be found to be a suspect or quasi-suspect class and afforded protections based on those classifications. Finally, Defendants' legal argument is not supported by federal or state case law, nor is it supported by the Colorado Constitution. Defendants' argument seems little more than a begging of the ultimate question to be answered. The second alleged compelling interest is not a compelling state interest.

The third interest claimed to be compelling is the preservation of the ability of the state to remedy discrimination against groups which have been held to be suspect classes. This claim is basically that there are insufficient fiscal resources available to the state to add another group to the rolls of those protected by existing civil rights laws or ordinances. Although not totally clear from defendants' presentation, this claim may relate in some way to Amendment 1 passed in the same election.

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The evidence presented does not satisfy this court that there is militant gay oppression in this state which endangers the state's political functions. Similarly the evidence does not persuade the court that absent Amendment 2, homosexuals and bisexuals are going to be found to be a suspect or quasi-suspect class and afforded protections based on those classifications. Finally, Defendants' legal argument is not supported by federal or state case law, nor is it supported by the Colorado Constitution. Defendants' arguments seems little more than a begging of the ultimate question to be answered. The second alleged compelling interest is not a compelling state interest.

The third interest claimed to be compelling is the preservation of the ability of the state to remedy discrimination against groups which may not be suspect classes. This claim is basically that cities are insufficient fiscal resources available to the state to add a protect group to the rolls of those protected by existing civil rights laws or ordinances. Although not totally clear from defendants' presentation, this claim may relate in some way to Amendment 2 passed in the same election.

Mr. Thomas Duran, formerly of the Colorado City Rights Division, and Mr. Ignacio Ruiz-Reyes, formerly of the Colorado

Civil Rights Commission, were both called to testify that without Amendment 2 there would be a dilution of protections afforded to existing suspect classes. This testimony was unclear because the absence of this amendment does not mean that gays have been added as a protected class to any statute. Similarly, Professor Joseph Broadus from the George Mason University School of Law testified that in his view the addition of gays to civil rights statutes or ordinances would lessen the public's respect for historic civil rights categories. He further testified that enforcement of civil rights protections for gays could result in a dilution of governmental resources allocated to protect those traditional civil rights.

Contrasted against this testimony was the testimony of Denver Mayor Wellington Webb and Brenda Tolliver-Locke, a Compliance officer charged with enforcing the Denver Anti-discrimination ordinance. Both testified that enforcing Denver's ordinance, which does contain a sexual orientation provision, does not detract from enforcing other aspects of the same ordinance. The inclusion of sexual orientation in the Denver ordinance has not necessitated an increase of enforcement staff nor has it resulted in an increase in costs.

Plaintiffs also presented the testimony of Leanna Ware from the Civil Rights Bureau of the State of Wisconsin. In 1982 Wisconsin became the first state to enact statutory prohibitions against discrimination based on sexual orientation. Ms. Ware testified that the sexual orientation cases under those Wisconsin statutes are a very small percentage of the total case load and have not limited enforcement of other parts of the Wisconsin statutes in any way.

The facts don't support defendants' position. Defendants' evidence was principally in the form of opinion and theory as to what would occur if a Denver type ordinance were adopted as a state statute. There is no such statute, nor is one proposed. Plaintiffs' evidence was based on what has happened over the course of eleven years in Wisconsin, and during the time in which the Denver ordinance has included a sexual orientation provision. Those actual experiences show that the presence of a sexual orientation provision has not increased costs or impaired the enforcement of other civil rights statutes or ordinances.

Additionally, the Court has a very real question as to whether fiscal concerns may rise to the level of a compelling interest. At least three U.S. Supreme Court cases have suggested that fiscal concerns do not reach such a level when weighed against fundamental or even less than fundamental rights. In Plyler v. Doe, 457 U.S. 202, 102 S.Ct. 2382, 72 L.Ed. 2d 786 (1982), the court was faced with an issue relating to public education of the children of undocumented aliens. The court in that case found that public education is not a fundamental right

and that undocumented aliens were not a suspect class. Having made these two findings, the court nonetheless found that whatever savings might be achieved by the state by denying public education to these undocumented aliens were insubstantial in the light of the costs to the children, the state, and the nation of not educating them. The other two cases which found fiscal integrity not to be a compelling interest balanced fiscal integrity with the right of interstate travel and right to welfare assistance to aliens. Shapiro v. Thompson, 394 U.S. 618, 22 L.Ed.2d 600, 89 S.Ct. 1322 (1969), and Graham v. Richardson, 403 U.S. 365, 29 L.Ed.2d 534, 91 S.Ct. 1848 (1971).

The Colorado Supreme Court has found the right invaded in this case to be fundamental, and this court now finds defendants' offered evidence of lack of fiscal ability unpersuasive in all respects.

Defendants' fourth alleged compelling interest is the prevention of governmental interference with personal, familial and religious privacy. Pastor Hasford Van of Boulder's Second Baptist Church testified about the possible impact of Boulder's ordinance on his church in view of the fact that there is no religious exception under that ordinance. By affidavit of John Gillespie, executive director of Rawhide Boys Ranch, New London, Wisconsin, defendants presented the experience of his institution under the Wisconsin statutes, especially as it related to employment of homosexuals. Personal privacy was addressed, at least tangentially, by several witnesses.

Preserving religious freedom is a compelling state interest. Religious freedom is protected by the First Amendment to the United States Constitution and by Article II, Section 4 of the Colorado Constitution. The ordinances from Aspen and Denver, have exceptions for religious beliefs. The issue of protecting religious freedom in the context of competing governmental interests has been discussed by the U.S. Supreme Court in Bob Jones University v. United States, 461 U.S. 574, 76 L. Ed. 2d 157, 103 S.Ct. 2017 (1983). The question in that case was whether non-profit private schools with racially discriminatory admission standards based on religious doctrine qualified as tax exempt organizations under the tax code. The Supreme Court concluded that private schools which employed such discriminatory policies were not tax exempt organizations. Recognizing the clash of interests and the impact of denying tax exempt status the Court held as follows:

> Denial of tax benefits will inevitably have a substantial impact on the operation of private religious schools, but will not prevent those schools from observing their religious tenets.

The governmental interest at stake here is

> compelling. As discussed in Part II-B, supra, the Government has a fundamental overriding interest in eradicating racial discrimination in education (Footnote omitted) -- discrimination that prevailed, with official approval, for the first 165 years of this Nation's Constitutional history. That governmental interest substantially outweighs whatever burden denial of tax benefits places on petitioners' exercise of their religious beliefs.

Bob Jones University, 461 U.S. at 603-604, 76 L. Ed. 2d, at 181.

In the present case, the religious belief urged by defendants is that homosexuals are condemned by scripture and therefore discrimination based on that religious teaching is protected within freedom of religion. In Bob Jones University, religious teaching was the basis for racial discrimination. The competing interest in the present case is the right to participate in the political process as outlined by the Colorado Supreme Court. On balance, this court concludes that the two rights, the religious right to discriminate and the homosexuals' right to participate in political process can coexist.

When the court finds that the defendants have presented a compelling state interest, the court is then charged with determining whether Amendment 2 is "narrowly drawn to achieve that interest in the least restrictive manner possible." Evans at 1275. In this case it is obvious that the amendment is not narrowly drawn to protect religious freedom. The narrowly focused way of addressing the Boulder ordinance is to add to it a religious exemption such as is found in the Denver and Aspen ordinances, not to deny gays and bisexuals their fundamental right of participation in the political process. The court specifically finds that Amendment 2 is not narrowly drawn to accomplish the purpose of protecting religious freedom.

Several witnesses testified on the issue of family privacy. In addition to Messrs. Tebedo, Perkins and Marco, Mr. Robert Knight, Director of Cultural Studies of the Family Research Council, was called to testify about family privacy. He testified that the Family Research Council is a pro-family lobbying organization and he admitted he is an opponent of the gay rights movement. He also testified that a part of his job is to be interviewed by the media and to debate gay and lesbian leaders. His testimony was that gay rights advocates are seeking to destroy the family by, in part, seeking to remove special societal protections from the family. He opined that the media is pro gay and advised the court of what was being discussed on afternoon television talk shows.

The court would have to assume or speculate what the family is, according to Mr. Knight. He never defined the family, nor

was he asked to provide a definition. [illegible]ourt assumes the family consists of a mother and father [illegible]arried and living together, and children from that marria[illegible]ive with their parents, more questions are raised than a[illegible]nswered. Does the family include parents who are divorced? Does it include a family where the parents are divorced and remarried? Does it include single parent families, or families created by second marriages with stepparents and stepchildren?

Most importantly, however, how does Amendment 2, which impacts on fundamental rights of an identifiable group, narrowly promote the goal of promoting family values? Seemingly, if one wished to promote family values, action would be taken that is pro-family rather than anti some other group. The tie-in between the interest of protecting the family and denying gays and bisexuals the right to political participation was not made by defendants' presentation.

Defendants failed to meet their burden as to the second prong of their claimed fourth compelling interest, showing that this Amendment is narrowly drawn to achieve its purpose of protecting religious freedom or family privacy.

The general issue of whether personal privacy is a compelling state interest was not adequately established. The court can only speculate as to what defendants mean by personal privacy and how Amendment 2 protects such a right. Defendants have not carried their burden as to this alleged "compelling state interest."

Defendants' fifth compelling interest is the prevention of government from subsidizing the political objectives of a special interest group. Their strongest argument on this claim was:

> For example, if a landlord is forced to rent an apartment to a homosexual couple, the landlord is being forced to accept, at least implicitly, a particular ideology. (Defendants' Trial Brief p. 69.)

No authority is offered for this fairly remarkable conclusion, and none has been found. Further, the logic of the argument is unclear. This claimed compelling interest was not supported by any credible evidence or any cogent argument, and the court concludes that it is not a compelling state interest.

The final interest urged is the promotion of the physical and psychological well-being of children. The defendants argue:

> The state has a compelling interest in supporting the traditional family because without it, our children are condemned to a higher incidence of social maladies such as substance abuse, poverty, violence, criminality

> greater burdens upon government, and perpetuation of the underclass. (Defendants' Trial Brief p. 74)

If the compelling interest relates to protecting children physically from pedophiles, the testimony of plaintiffs' witness Dr. Carole Jenny is more persuasive than anything presented by defendants. Dr. Jenny practices at Denver's Children's Hospital and made a study of persons who sexually abused children who were brought to that hospital. She indicated that pedophiles are predominately heterosexuals not homosexuals. If the compelling interest is in protecting the psychological well being of homosexual youth, the Court is unable to discern how allowing discrimination against them by virtue of the Colorado Constitution promotes their welfare. Defendants have failed to present sufficient evidence to support this claimed compelling interest.

The defendants have presented evidence of only two compelling state interests that Amendment 2 serves, the promotion of religious freedom and the promotion of family privacy. As to those two interests the Amendment is not "narrowly drawn to achieve that purpose in the least restrictive manner possible." Defendants have failed to carry the burden assigned to them by the Colorado Supreme Court and therefore this Court concludes that Amendment 2 is unconstitutional as being violative of the fundamental right of an identifiable group to participate in the political process without being supported by a compelling state interest.

Plaintiffs' Claim of Suspect or Quasi-Suspect Class

The above ruling, however, is not the end of the matter. In one of their trial briefs plaintiffs admit that "if the defendants do not meet their burden of showing that Amendment 2 serves a compelling interest by the least restrictive means, then Amendment 2 must be held unconstitutional. . . ." (Plaintiffs' Trial Memorandum on Legal Standards for Determining Whether Amendment 2 Serves a Compelling State Interest Through The Least Restrictive Means, Footnote 1, p. 2). Notwithstanding the fact that the court has now ruled as plaintiffs suggest, they nonetheless seek to have the court rule on three additional matters. First they claim that homosexuals and bisexuals ought to be found to be a suspect class and entitled to strict scrutiny review for that reason. Second they claim that homosexuals and bisexuals ought to be found to be a quasi-suspect class and be entitled to heightened scrutiny review. Finally they claim that Amendment 2, even if subject to the least stringent standard of review, the rational basis review, ought to be found unconstitutional.

Plaintiffs' presentation seeking suspect class status may be new or a change of plaintiffs' initial position. The Supreme Court was unaware that plaintiffs were seeking suspect class status. That court noted, "That gay men, lesbians, and bisexuals have not been found to constitute a suspect class, (citations omitted) and that plaintiffs do not claim that they constitute such a class do not render the Equal Protection Clause inapplicable to them." (Emphasis supplied). Evans at 1275.

Additionally, the question of whether plaintiffs had pled a claim of suspect or quasi-suspect class in a manner sufficient to place defendants on notice of those claims was the subject of a motion in limine. This Court ultimately denied the motion which sought to exclude evidence relating to the question of suspect of quasi-suspect class, and the Court will address those issues in this ruling.

Plaintiffs urge that this Court should find that the elements associated with a suspect class are present in the homosexual and bisexual community. Plaintiffs argue that those elements are: (1) common traits; (2) a history of discrimination; (3) especially vulnerable in society, and that; (4) the common trait is irrelevant to individual merit. This set of elements is a re-definition or amalgamation of elements from other cases. No case cited contains these four elements. In order to persuade the court, plaintiffs filled the witness stand with doctors, psychiatrists, genetic explorers, historians, philosophers, and political scientists. Having chosen to present these types of witnesses, defendants felt obliged to respond in kind.

Standards for determining whether a group may be considered a "suspect" or "quasi-suspect" class have been discussed in various opinions.

> To be a "suspect" or "quasi-suspect" class, homosexuals must 1) have suffered a history of discrimination; 2) exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group; and 3) show that they are a minority or politically powerless, or alternatively show that the statutory classification at issue burdens a fundamental right. Bowen v. Gilliard, 483 U.S. 587, 602-603, 107 S.Ct. 3008, 3018, 97 L.Ed. 2d 485 (1987)

High Tech Gays v. Defense Industrial Security Clearance Office, 895 F.2d 563, 573 (9th Cir. 1990).

> The system of alleged discrimination and the class it defines have none of the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a

> position of political powerlessness as to command extraordinary protection from the majoritarian political process.

San Antonio School District v. Rodriguez, 411 U.S. 1, 28, 36 L.Ed.2d 16, 41, 93 S.Ct. 1278 (1973) (same language quoted with approval in Massachusetts Board of Retirement v. Murgia, 427 U.S 307, 313, 49 L.Ed.2d 520, 525, 96 S.Ct. 2562).

In applying these standards to homosexuals and bisexuals, no appellate court has yet found them to be either a "suspect" or quasi-suspect" class. Ben-Shalom v. March, 881 F.2d 454 (7th Cir. 1989)(attempted re-enlistment in military by lesbian); High Tech Gays v. Defense Industrial Security Clearance Office, 895 F.2d 563 (9th Cir. 1990)(secret and top-secret security clearances for homosexuals); Padula v. Webster, 822 F.2d 97 (D.C. Cir. 1987)(Homosexuals seeking to be hired by the FBI); Bowers v. Hardwick, 478 U.S. 186, 92 L.Ed.2d 140, 106 S.Ct. 2841 (1986) (attack on constitutionality of the Georgia sodomy statute by homosexuals). Woodward v. United States, 871 F.2d 1068 (Fed. Cir. 1989) (release of homosexual member of Navy reserve from active duty). It also bears noting that to date the Supreme Court has only recognized three classifications as suspect and two as quasi-suspect.

> However, the Supreme court has recognized only three classifications as suspect: race, *Loving v. Virginia*, 388 U.S. 1, 11, 87 S.Ct. 1817, 1823, 18 L.Ed.2d 1010 (1967), alienage, *Graham v. Richardson*, 403 U.S. 365, 372, 91 S.Ct. 1848, 1852, 29 L.Ed.2d 534 (1971); *but see Ambach v. Norwick*, 441 U.S. 68, 72-75, 99 S.Ct. 1589, 1592-93, 60 L.Ed.2d 49 (1979), and national origin, *Korematsu v. United States*, 323 U.S. 214, 216, 65 S.Ct. 193, 194, 89 L.Ed. 194 (1944); and two others as quasi-suspect: gender, *Mississippi University for Women v. Hogan*, 458 U.S. 718, 723-24, 102 S.Ct. 3331, 3335-36, 73 L.Ed.2d 1090 (1982), and illegitimacy, *Lalli v. Lalli*, 439 U.S. 259, 265, 99 S.Ct. 518, 523, 58 L.Ed.2d 503 (1978).

Padula, at 102.

Plaintiffs called Dr. Richard Green, a psychiatrist specializing in human sexuality, Dr. Marcus Conant, a Board Certified Dermatologist whose practice consists mainly of treating AIDS patients in San Francisco, and Dr. Dean Hamer, a molecular biologist and genetic explorer, each of whom testified from the perspective of his discipline that homosexuals have certain common traits. Dr. Ted Marmor, an expert in psychiatry testified as to his opinion that homosexuality has no single cause but that there is probably some genetic cause and some early environmental, sociological cause. They called Professor

Burke Marshall a law professor from Yale who was centrally involved in drafting Title VII of the 1964 Civil Rights Act, and Professor George Chauncey a History professor from the University of Chicago to discuss the history of discrimination against homosexuals and bisexuals. They offered Professor Kenneth Sherrill to describe gays' and bisexuals' vulnerability in society and to discuss their political powerlessness. All of their witnesses in one way or another testified that a person's homosexuality or bisexuality is not relevant to the merit of the individual.

One of the hot debates among witnesses addressed the question of whether homosexuality is inborn, a product of "nature", or a choice based on life experiences, a product of "nurture". Plaintiffs strongly argue that homosexuality is inborn. All the suspect and quasi- suspect classes, race, alienage, national origin, gender and illegitimacy, are inborn. Defendants argue that homosexuality or bisexuality is either a choice, or its origin has multiple aspects or its origin is unknown. The preponderance of credible evidence suggests that there is a biologic or genetic "component" of sexual orientation, but even Dr. Hamer, the witness who testified that he is 99.5% sure there is some genetic influence in forming sexual orientation, admits that sexual orientation is not completely genetic. The ultimate decision on "nature" vs "nurture" is a decision for another forum, not this court, and the court makes no determination on this issue.

The federal court in High Tech Gays v. Defense Industrial Security Clearance Office, supra, concluded that there is a history of discrimination against gays. That same court concluded that gays were not a suspect class, however, because they failed to establish two other required elements. This court concludes as did the court in High Tech Gays that there is a history of discrimination against homosexuals.

The court cannot conclude, however, that homosexuals and bisexuals remain vulnerable or politically powerless and in need of "extraordinary protection from the majoritarian political process" in today's society. Failure to prevail on an issue in an election, such as Amendment 2 is not a demonstration of political powerlessness. Indeed, in the case of the vote on Amendment 2, the evidence supports a finding of the political power of gays and bisexuals. According to the figures presented to the court, more than 46% of Coloradans voting voted against Amendment 2. Testimony placed the percentage of homosexuals in our society at not more than 4%. If 4% of the population gathers the support of an additional 42% of the population, that is a demonstration of power, not powerlessness. The President of the United States has taken an active and leading role in support of gays, and an increasing number of states and localities have adopted gay rights protective statutes and ordinances such as the

three city ordinances in the present case. Because the gay position has been defeated in certain elections, such as Amendment 2, does not mean gays are particularly politically vulnerable or powerless. It merely shows that they lost that election. No adequate showing has been made of the political vulnerability or powerlessness of gays.

The evidence at trial was that there is no identifiable majority in American politics. Numerical majorities of whites, heterosexuals and women were identified, but each numerical majority is so internally divided that it does not form an effective political majority. Therefore, the evidence showed political majorities are formed through the process of coalition building on an issue by issue, or election by election, basis. Those coalitions come together or do not come together to the level of a majority. What was established to the satisfaction of this court is that gays and bisexuals though small in number are skilled at building coalitions which is a key to political power. They are not therefore politically vulnerable or powerless. Homosexuals fail to meet the element of political powerlessness and therefore fail to meet the elements to be found a suspect class.

Case law has not clearly differentiated between the elements of a "suspect" class and a "quasi-suspect" class. Plaintiffs similarly have not established to the satisfaction of this court what those elements are, how they are distinguished from a suspect class, and how they apply to homosexuals and bisexuals. There are two recognized "quasi-suspect" classes, gender and illegitimacy. Neither of the existing quasi-suspect classes encompass homosexuals and bisexuals. No real effort was put forth to establish that homosexuals and bisexuals fit the existing definitions. Plaintiffs have failed to carry their burden to establish that homosexuals are a quasi-suspect class.

USE OF RATIONAL BASIS TEST

Finally, plaintiffs ask that this court address Amendment 2 using the rational basis test. The Colorado Supreme Court has ruled that Amendment 2 invades a fundamental right of an identifiable group and that the test to be applied is the strict scrutiny test. The rational basis test is to be used when there is no fundamental right or suspect class involved. Therefore this court declines to apply a legally inappropriate test to this case.

The court notes that two recent cases have applied a rational basis test to excluding homosexuals from the military. In each case, however, no fundamental right was involved. Dahl v. Secretary of U.S. Navy, 830 F. Supp. 1319 (E.D. Cal. Aug. 30,

1993) and Steffan v. Aspin, 1993 W.L. 465330 (D.C. Cir.) (November 16, 1993). Those cases examined the question of homosexuality in the military and addressed the historic "military deference" which has been part of earlier decisions in the area. Both cases found there was no rational basis for excluding homosexuals from the military.

In Steffan Chief Judge Mikva pointed out that the case was different from Bowers v. Hardwick, 478 U.S. 186 in that Bowers dealt with homosexual conduct while Steffan dealt with homosexual orientation. He also acknowledged that whether an agency of the federal government can discriminate on the basis of sexual orientation "remains an open question," citing to Doe v. Casey, 796 F.2d 1508, 1522 (D.C. Cir. 1986), aff'd in part and rev'd in part sub nom Webster v. Doe, 486 U.S. 592 (1988). Chief Judge Mikva further acknowledged that his decision in Steffan was only the beginning of the answer to that "open question." In Dahl the Federal District Court examined at length the application of the rational basis test to excluding homosexuals from the military and found the ban did not stand up to even that fairly minimal standard of review.

These cases do not impact on the present decision because of the fundamental right involved in the present case and the necessarily different standard of review.

JUDGMENT

Amendment 2 is found to be unconstitutional and the court orders that the preliminary injunction be made permanent.

So ordered this 14th day of December, 1993.

BY THE COURT:

H. JEFFREY BAYLESS
District Court Judge

JUDGMENT

Accordingly it is found to be unconstitutional and the court orders that the preliminary injunction be made permanent.

So ordered this 16th day of December, 1993.

BY THE COURT:

H. JEFFREY BAYLESS
District Court Judge